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FILED
OCT 30 1973

In The

Supreme Court of the United States

October Term, 1973

No. 73-1068

SALVATORE TERRACIANO,

Petitioner,

vs.

HAROLD J. SMYTH, Superintendent of Attica Correctional Facility,

and

CARL L. DRAKE, Warden of Clinton Prison,

Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITIONER'S REPLY BRIEF

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SALVATORE TERRACIANO,

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HAROLD J. SMITH, Superintendent of Attica Correctional Facility,

and

CARL F. DRAXLER, Sheriff of Chemung County,

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PETITIONER'S REPLY BRIEF

The district attorney's suggestion that the search by agent Kowitt was simply a routine regulatory inspection made with petitioner's consent distorts the record beyond recognition. There is no evidence that Kowitt coincidentally appeared at the Windsor Pharmacy to conduct one of his regular audits. To the contrary, Kowitt arrived with the state police officer, Capozzi, and was directed by Capozzi to conduct this search. The tandem operation is clearly demonstrated by the unique occurrence of Kowitt's advising petitioner of his *Miranda* warnings *prior* to conducting his search.

That petitioner did not consent to the search is beyond peradventure. Having only three days previously been arrested and charged with governmental obstruction for refusing to permit this very search by the state police, and having told Kowitt that he wished to call his attorney before any search was effected, petitioner could do no more. The feeble contention that no further objection was made by petitioner or his attorney does not create consent where there was none. As petitioner testified:

> "The fact I had been arrested previously by Mr. Capozzi and didn't want to get into any more trouble by refusing the New York State Narcotics Inspector to any records, and I was afraid of my further arrest." (36)[1]

Giving way to searches and seizures effected pursuant to seemingly lawful authority has never been construed as consent to such conduct. *Bumper* v. *North Carolina*, 391 U.S. 543 (1968; *Johnson* v. *United States*, 333 U.S. 10 (1948); *Amos* v. *United States*, 255 U.S. 313 (1921). And the requirement that records be maintained by licensed pharmacists — or doctors or drug manufacturers — does not *ipso facto* subject those individuals to warrantless searches conducted as part of police investigations for evidence of crime. This Court has never condoned the type of search effected here. Therefore, this forcible search and seizure, accomplished over petitioner's clearly stated objection, comes well within the scope of the conduct condemned in *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970).

The bootstrap argument that the agent found evidence as a result of this search which was subsequently used in a criminal proceeding has been roundly rejected by this Court. *Bumper* v. *North Carolina*, 391 U.S. 543 (1968). And the hollow

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[1] Refers to appendix attached to respondents' brief in opposition.

suggestion that the United States Supreme Court should refrain from correcting a fourth amendment violation because a city trial court has approved conduct quite dissimilar in a totally unrelated case is disingenuous to say the least. In *People* v. *Curco Drugs*, 76 Misc.2d 222, 350 N.Y.S.2d 74 (N.Y.Crim.Ct., Kings Co., 1973), the state narcotics agents, having begun a routine inspection, were aware of the Public Health Law violations. Our case is quite different, for the narcotics agent was conducting nothing more than a fishing expedition on behalf of the state police. As Capozzi said, "Let me know if you find anything, Ted" (35). Surely the existence of an irrelevant, nondefinitive decision by an inferior trial court will not deter this Court from pursuing its obligation to correct a constitutional violation. *Marbury* v. *Madison*, 1 Cranch 137 (1803).

Unquestionably, Kowitt was recruited by the state police and conducted the investigation which they could not legally perform — under the guise of an administrative search. We do not quarrel with the state's right to regulate narcotic drugs. Nor would we complain were the present search one conducted pursuant to a constitutional statute of the genre approved in *Biswell* v. *United States*, 406 U.S. 311 (1972), and for purposes other than to gather evidence of crime for a police investigation. The present statute, unlimited in time and place,[2] and the

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[2]It is a mystery how the carefully chosen language of the state statute permitting searches and seizures "at all times," unequivocal and clear on its face, could now be represented by the district attorney to mean something other than what it says. The very concern which this Court voiced in *Katz* v. *United States*, 389 U.S. 347 (1967), that restraint may not be left to agents in the field (or department policy), protects not only petitioner but all the victims of official misconduct whose objections may not receive the attention of this Court. For it is apparently a department policy to curry cooperation among pharmacists, physicians and drug manufacturers by assuring them that their refraining from objecting to what constitutes constitutional violations will be called to the attention of department superiors (37).

abhorrent misuse of these inadequate statutory safeguards require a grant of certiorari in this case.

Respectfully submitted,

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